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No. 87-1509

SUPREME COURT U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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DAVID T. HODDER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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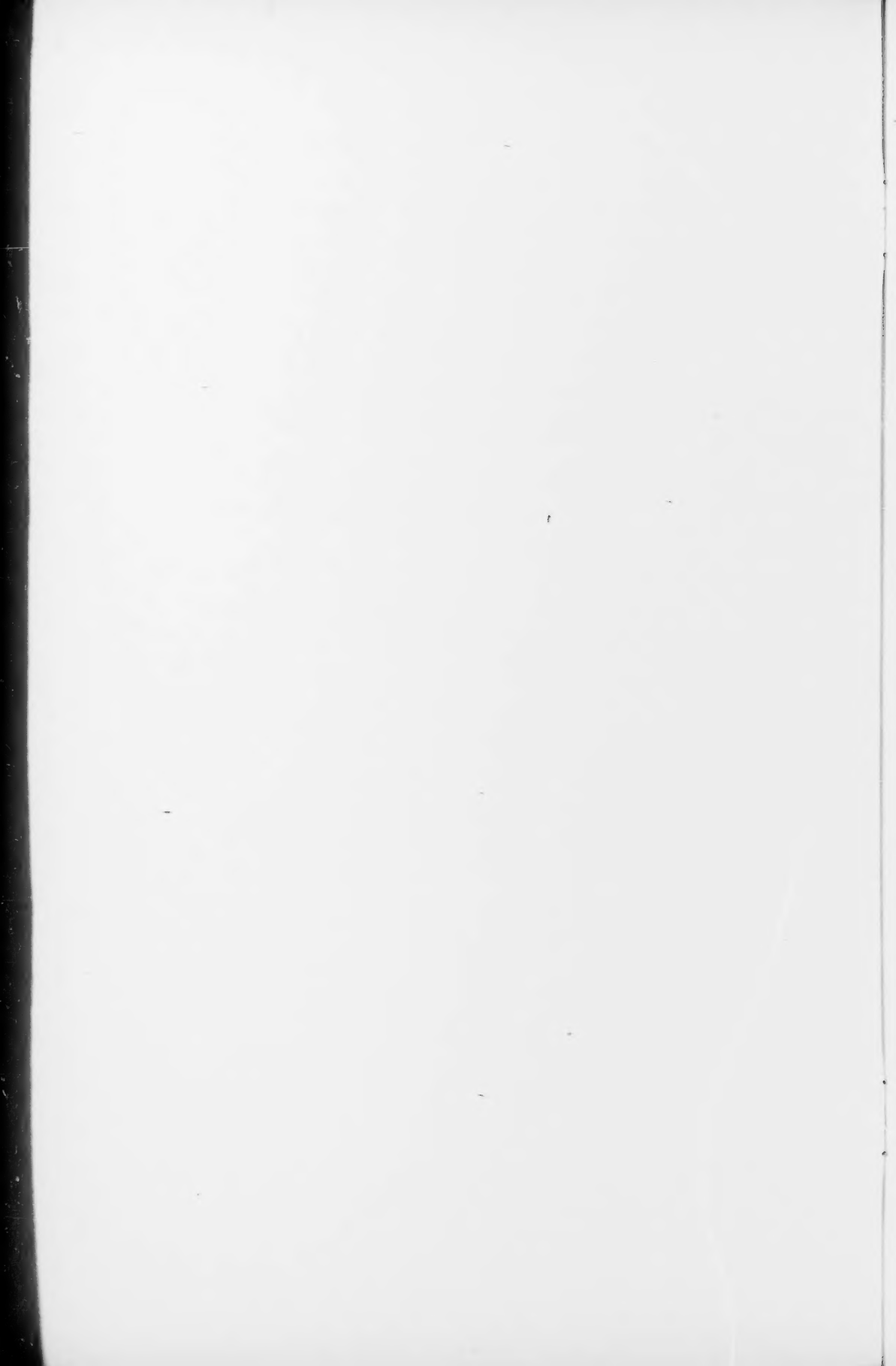


### **QUESTIONS PRESENTED**

1. Whether the district court convicted petitioner based on findings of fact at "fatal variance" with the allegations set forth in the indictment.

2. Whether the evidence produced at trial supported the conviction.

3. Whether petitioner was deprived of a fair trial based on a combination of factors relating to the formulation of the indictment, joinder, and the use of circumstantial evidence.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-7) and the opinion of the district court (Pet. App. 8-22) are unreported.<sup>1</sup>

## **JURISDICTION**

The judgment of the court of appeals (Pet. App. 33-34) was entered on September 4, 1987. A petition for rehearing was denied on December 10, 1987. On February 11, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 9, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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<sup>1</sup> The opinion of the court of appeals in a companion case (Pet. App. 23-32) is reported at 827 F.2d 586.

## STATEMENT

Following a bench trial in the United States District Court for the District of Nevada, petitioner was convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371. He was also convicted of aiding and abetting a federal employee's participation in the administration of a government contract in which the employee held a financial interest, in violation of 18 U.S.C. 208(a). The district court suspended imposition of sentence and placed petitioner on probation for five years. The court of appeals affirmed in part, reversed in part, and remanded (Pet. App. 1-7).

1. Count 1 of the indictment alleged that from approximately November 1980 to January 1983 petitioner and Richard Jewell, an employee of the Bureau of Land Management (BLM) in the Department of the Interior, conspired "to defraud the United States Government of and concerning its governmental functions and rights" (Pet. App. 37-38). Specifically, Count 1 charged that petitioner received a BLM contract for a project proposed by Jewell and then hired Jewell and paid him various sums for services under the contract (*id.* at 39-49). Counts 2 through 14 of the indictment further alleged that from June 17, 1981, through September 1982 petitioner aided and abetted Jewell's participation in the approval of government payments on contract invoices in which Jewell had a financial interest (*id.* at 49-62). Finally, Counts 15 through 17 of the indictment alleged that petitioner submitted false claims under the contract (*id.* at 63-65).

2. In the findings of fact submitted in support of its verdict, the district court first evaluated the evidence supporting Count 1. The court found that petitioner owned Geoscientific Systems and Consulting (GSC) and that the BLM's Technical Proposal Evaluation Committee, chaired



by Jewell, proposed to negotiate a contract with GSC to perform an air quality study in Nevada for the BLM (Pet. App. 10). GSC received the contract and Jewell became responsible for supervising GSC's performance and approving payments due under the contract (*ibid.*). GSC then hired Jewell through various intermediary companies to take aerial photographs as part of the air quality study (*id.* at 10-11). The court found that petitioner and Jewell established the intermediaries "for the purpose of insulating and and disguising payments from the Bureau of Land Management to Jewell through [petitioner]" (*id.* at 12).

The court cited various items of documentary evidence showing that petitioner and Jewell both had "full knowledge of the other's participation in the conspiracy" (Pet. App. 13) and observed that petitioner's testimony "confirmed those findings and conclusions" (*id.* at 13-14; see *id.* at 14-15). The court accordingly concluded that "the government established beyond a reasonable doubt that Defendant Richard Jewell and [petitioner] entered into an agreement to defraud the United States Government of and concerning its governmental functions; that they did so willfully with knowledge of the activities of the other, and in furtherance of the conspiracy, and committed the overt acts set forth in paragraphs 3 through 16 on pages 7 through 9 of the Indictment" (*id.* at 16-17).

The court next addressed the aiding and abetting charges set forth in Counts 2 through 14 of the indictment. The court found that petitioner knew that Jewell "had a present financial interest in the air quality contract and that he participated personally and substantially in the contract," and that petitioner aided Jewell in violating 18 U.S.C. 208(a) by making payments to Jewell through the intermediary companies (Pet. App. 18). The court concluded, however, that the government had failed to prove

beyond a reasonable doubt the false claim charges set forth in Counts 15 through 17 of the indictment (*id.* at 19-20).

3. The court of appeals affirmed in part, reversed in part, and remanded (Pet. App. 1-7). The court rejected petitioner's contention that the district court's findings were at variance with the indictment, observing that the "crime charged was the crime of which [petitioner] was convicted" (*id.* at 4). The court next concluded that the government's evidence was sufficient to sustain the convictions of conspiracy and of aiding and abetting Jewell in a violation of 18 U.S.C. 208(a) (Pet. App. 4-5). The court also rejected petitioner's contention that his trial was "fundamentally unfair" because the government simultaneously prosecuted him on both the conspiracy and the aiding and abetting counts (*id.* at 6-7). However, the court reversed 12 of the 13 aiding and abetting counts as multiplicitous, based on its previous decision holding that Jewell could be convicted on only one of the substantive counts (*id.* at 6, citing *United States v. Jewell*, 827 F.2d 586 (9th Cir. 1987)).

#### ARGUMENT

Petitioner contends that the district court's factual findings are at "fatal variance" with the indictment (Pet. 15-17, 25-27), that the evidence does not support his convictions (*id.* at 17-20), and that various other factors, related to the formulation of the indictment, joinder, and the use of circumstantial evidence, rendered his trial "fundamentally unfair" (*id.* at 20-23). The court of appeals correctly rejected each of these contentions, and its unreported and factbound decision, which does not conflict with any decision of this Court or another court of appeals, warrants no further review.

1. Petitioner is mistaken in arguing that the district court's factual findings with respect to the conspiracy are at variance with the indictment. The indictment charged petitioner and Jewell with conspiracy "to defraud the United States Government of and concerning its governmental functions and rights" including "its right to have its business and its affairs, particularly the transaction of the official business of the [BLM], conducted free from fraud, conflicts of interest, corruption, dishonesty, deceit, misconduct, partiality and bias" (Pet. App. 38). The indictment was not limited, as petitioner suggests, to "a conspiracy that was formed prior to and had as its object the award of the general contract" (Pet. 15). Instead, the indictment alleged a conspiracy that began "on or about November 1980" and continued through "on or about January 1983, the exact dates being unknown to the grand jury" (Pet. App. 37). Thus, the indictment alleged a conspiracy that continued long after January 15, 1981, the date on which the contract was awarded.<sup>2</sup> Furthermore, while the indictment expressed the grand jury's belief that the conspiracy commenced prior to the award of the contract, petitioner's conviction did not depend on a finding to that effect. "Convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment." *United States v. Miller*, 471 U.S. 130, 136 (1985). As the court of appeals explained (Pet. App. 3-4 (emphasis in original)):

The district court specifically found [petitioner] guilty of a conspiracy to defraud the government, using the

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<sup>2</sup> Indeed, 8 of the 11 paragraphs describing the "Manner and Means" of the conspiracy related to the conspirators' post-award activities (Pet. App. 40-44), and 14 of the 16 alleged overt acts occurred after the award of the contract (*id.* at 45-49).

precise words of the indictment. The court convicted [petitioner] on the basis of essentially the same acts that were recounted in the indictment. It is of no consequence that the court did not consider that *all* of the acts specified in the indictment were part of the conspiracy. The crime charged was the crime of which [petitioner] was convicted.

See, e.g., *United States v. Miller*, 471 U.S. at 135-140; see also *Ford v. United States*, 273 U.S. 593 (1927); *Salinger v. United States*, 272 U.S. 542 (1926).

2. Petitioner's closely related argument that the evidence does not support his conviction is similarly misguided. Petitioner reasons that the district court's "general finding of guilt" conflicts with its finding of a "post-award conspiracy" (Pet. 17) because, in petitioner's view, the indictment permitted conviction only on the basis of a pre-award conspiracy and "the evidence was wholly insufficient to support a finding that he had entered into the pre-award conspiracy" (*id.* at 18-19). But as we have explained, the district court's determination of guilt was based on its finding that petitioner engaged in the conspiracy charged in the indictment. As the court of appeals stated, "any rational trier of fact could find beyond a reasonable doubt that [petitioner] willfully became a member of a conspiracy to defraud the government, and that he committed several overt acts in furtherance of the conspiracy" (Pet. App. 4). This Court does not, of course, "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 8 (quoting *Graver Tank & Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1949)). See also *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). This is not such a case.

3. Petitioner raises a collection of unarticulated "fair trial concerns" (Pet. 20) that rest on the government's election to charge petitioner with conspiracy and multiple counts of aiding and abetting, its decision to try petitioner and Jewell in a single proceeding, and its use of "circumstantial evidence" at trial (*id.* at ii-iii). But to the extent that these factbound arguments were raised in the court of appeals, they were correctly rejected (Pet. App. 6-7), and petitioner himself "does not contend that these concerns or the third question presented would, alone, warrant review by this Court" (Pet. 20).

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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